



U.S. Citizenship
and Immigration
Services

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NOV 01 2004

FILE:

Office: CALIFORNIA SERVICE CENTER

Date:

IN RE:

Petitioner:
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for

Robert P. Wiemann, Director
Administrative Appeals Office

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identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in Guam as a specialty cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are unavailable.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 1, 2000. The proffered wage as stated on the Form ETA 750 is \$14.42 per hour, which equals \$29,993.60 per year.

On the petition, the petitioner stated that it was established during 1982 and that it employs 155 workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since March of 1998. In support of the petition counsel provided the petitioner's 2000 and 2001 Form 1120 U.S. Corporation Income Tax Returns. The 2000 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$83,986 during that year. Because the corresponding Schedule L was not provided this office is unable to calculate the petitioner's year-end net current assets.

The 2001 return shows that the petitioner declared a loss of \$558,355 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Counsel also submitted a letter, dated March 19, 2003, from an accountant. That letter states that the petitioner has the ability to pay the proffered wage.

On May 19, 2003, the California Service Center requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The Service Center requested that the evidence be in the form of copies of annual reports, federal tax returns, or audited financial statements. The Service Center specifically requested evidence pertinent to 2002.

In response, counsel submitted a 2002 Form W-2GU Guam Wage and Tax Statement showing that the petitioner paid the beneficiary \$29,927.77 during that year.

Further, counsel submitted the petitioner's 2002 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner declared a loss of \$25,395 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$274,486 and current liabilities of \$269,041, which yields net current assets of \$5,445.

Counsel also submitted another letter, dated August 1, 2003, from its accountant. That letter stresses the petitioner's net income before deduction of its depreciation deduction and states that the petitioner has the ability to pay the proffered wage.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on September 2, 2003, denied the petition.

On appeal, counsel stated that the petitioner had paid the beneficiary the proffered wage since hiring him on June 14, 2001. Counsel provides a copy of an H2-B visa issued to the beneficiary on May 7, 2001 as support for that assertion. Counsel also provides a copy of a 2001 W-2 form showing that the petitioner paid the beneficiary \$16,103.80 during that year. This office notes that previously, on the Form ETA 750, Part B, the beneficiary stated that he had worked for the petitioner since March of 1998.

Counsel argues that the petitioner's depreciation deduction is not an actual loss and implies that it should be added back into the petitioner's income in the calculation of the petitioner's ability to pay the proffered wage. Counsel also cites the petitioner's total assets and the total wages paid by the petitioner to all of its employees as additional evidence of that ability.

Further, counsel argues that the petitioner's decreased losses from 2001 to 2002 show not only a reasonable expectation of increasing profits but a real increase in profits. Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), for the proposition that this shows the ability to pay the proffered wage.

Counsel cites non-precedent decisions for various other propositions. Although 8 C.F.R. 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel's citation of non-precedent decisions is of no effect.

Counsel is correct that a depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner established that it paid the beneficiary \$16,103.80 during 2001 and \$29,927.77 during 2002.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, the court held that CIS, then the Immigration and Naturalization Service, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$29,993.60 per year. The priority date is March 1, 2000. During 2000, the petitioner declared taxable income before net operating loss deduction and special deductions of \$83,986. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2000 out of its profits.

During 2001 the petitioner paid the beneficiary \$16,103.80 in wages. The petitioner is obliged to show the ability to pay the \$13,889.80 balance of the proffered wage. The petitioner declared a loss of \$558,355 as its taxable income before net operating loss deduction and special deductions during 2001. The petitioner has not shown the ability to pay any portion of the proffered wage out of its income during that year. At the end of that year, the petitioner had negative net current assets. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has not demonstrated that any other funds were available during that year with which to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared a loss of \$25,395 as its taxable income before net operating loss deduction and special deductions. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its income. At the end of that year, the petitioner had net current assets of \$5,445. That amount is insufficient to pay the proffered wage. The 2002 Form W-2GU in the file, however, shows that the petitioner paid the beneficiary \$29,927.77 during that year. That amount is only slightly less than the proffered wage. The petitioner has shown the substantial ability to pay the proffered wage during 2002.

Counsel urges that the change in the petitioner's taxable income before net operating loss deduction and special deductions from a large loss during 2001 to a moderate loss during 2002 indicates that the petitioner has enjoyed an increase in profits. Counsel cites *Matter of Sonegawa, supra.*, for the proposition that the petition may therefore be approved.

Matter of Sonegawa, 12 I&N Dec. 612 (Reg. Comm. 1967), however, relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years. During the year in which the petition was filed in that case the petitioner changed business locations and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business.

In *Sonegawa*, the Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in Time and Look magazines. Her clients included Miss Universe, movie actresses, and society matrons.

The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 and 2002 were uncharacteristically unprofitable years for the petitioner. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative. Further, this office does not concur with counsel's assertion that a change from a large loss to a smaller loss is an increase in profits within the meaning of *Sonegawa*. The petitioner declared no profit at all during 2000 or 2001. Therefore, the difference between those years cannot fairly be characterized as an increase in profits.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001.¹ Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

¹ On the petition, the petitioner reported that it employs in excess of 100 workers. Consistent with 8 C.F.R. § 204.5(g)(2), a letter from an officer of the petitioning company stating that the petitioner is able to pay the proffered wage might have been sufficient to demonstrate its ability to pay the proffered wage. No such letter from an officer of the company was submitted, however.